Supreme Court, U. S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1589

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK SANTOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JULIUS LUCIUS ECHELES
MICHAEL G. CHERONIS
CAROLINE JAFFE
35 E. Wacker Drive
Chicago, Illinois 60601

Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Judgment and Order Below 2

Jurisdiction of this Court 2

Questions Presented for Review 2

Constitutional Provisions and Statute Involved 4

Statement of the Case 5

Statement of Facts 7

Reasons for Granting the Writ 12

1. The First Circuit having determined that the November transaction in Indiana involving Izzi and petitioner was *not* a part of a single conspiracy as charged, therefore reversing Izzi's conviction:

(A) Petitioner's conviction should likewise be reversed, inasmuch as his November, 1976 connection with Izzi is the sole, unambiguous drug-related evidence against petitioner, all other incriminatory evidence against him being subject to innocent interpretation;

(B) Where the reviewing court has concluded that evidence was presented to the jury concerning a set of circumstances outside the scope of a single conspiracy as charged, that court's determination, upon the facts, that petitioner was not prejudiced thereby, was reached by use of an improper standard;

PAGE

(C) In being exposed to evidence of the November-Indiana transaction which was not properly a part of the conspiracy as charged, the jury was thereby improperly exposed to evidence that petitioner participated in a separate, unrelated crime, to his manifest prejudice.

Certiorari should be allowed so that this Court may direct itself to the increasingly prevalent problem, so frequently encountered in complicated conspiracy prosecutions, of introduction of evidence outside the scope of a single conspiracy as charged, and, more particularly, deal with important questions as to the proper, constitutionally mandated methods of assessing the fairness of a conspiracy trial at which such extra-conspiracy evidence has been admitted. 12

2. Where, after conviction, it became clear that the trial testimony of no less than four government witnesses to the November-Indiana incident had given grand jury testimony at variance with their in-court testimony—which grand jury testimony was not turned over to the defense at any time prior to conviction:

(A) The trial court committed prejudicial error and violated petitioner's constitutional rights —particularly, his right to effective cross-examination as guaranteed by the Sixth Amendment (and as effectuated in part by the Jencks Act)—by denying his motion for new trial based on the government's failure to furnish the said prior grand jury testimony, erroneously determining (i) that the non-disclosed material was not possibly impeaching, and (ii) that in any event, considering all the evidence petitioner was not prejudiced by the non-disclosure;

PAGE

(B) In light of the reviewing court's determination that the November-Indiana transaction was not a part of a single conspiracy as charged, that court's conclusion—affirming the trial court's finding that the prosecution's failure to furnish the defense with the said grand jury testimony concerning that very transaction prior to conviction, was not prejudicial to petitioner—is even more manifestly erroneous.

Certiorari should be allowed so that this Court may expound on its holdings in *Brady* v. *Maryland,* 373 U.S. 83, and *United States* v. *Agurs,* 427 U.S. 97, as applied to the government's negligent non-disclosure of properly producible material, and, further, set forth standards concerning what material is "possibly impeaching." 19-20

Conclusion 25

Appendices:

Appendix A—Opinion of the Court of Appeals for the First Circuit .....App. 1

Appendix B—Order of the First Circuit denying petition for rehearing .....App. 17

AUTHORITIES CITED

Cases

PAGE

Barbee v. Warden, 331 F.2d 842 (4 Cir. 1964) 22, 23

Brady v. Maryland, 373 U.S. 83 (1963) 19, 24

Brooks v. United States, 164 F.2d 142 (5 Cir. 1947) ..15, 17

Canella v. United States, 157 F.2d 470 (9 Cir. 1946) 15

Curran v. Delaware, 259 F.2d 707 (3 Cir. 1958) 22

Daily v. United States, 282 F.2d 818 (9 Cir. 1960) 15

Davis v. Alaska, 415 U.S. 308 (1974) 21

Fernandez v. United States, 329 F.2d 899 (9 Cir. 1964) 15, 16

Franks v. Delaware, 438 U.S. 154 (1978) 22

Giglio v. United States, 405 U.S. 150 (1972) 22

Kotteakos v. United States, 328 U.S. 750 (1946) 15

Michelson v. United States, 335 U.S. 469 (1948) 17

Pyle v. Kansas, 317 U.S. 213 (1942) .....

Rocha v. United States, 288 F.2d 545 (9 Cir. 1961) 15

Stirone v. United States, 361 U.S. 212 (1960) 17

United States v. Agurs, 427 U.S. 97 (1976) 20, 24

United States v. Barash, 365 F.2d 395 (2 Cir. 1966) 21

United States v. Bertolotti, 529 F.2d 149 (2 Cir. 1975) 16

United States v. Borelli, 336 F.2d 376 (2 Cir. 1964) 22

United States v. Butler, 494 F.2d 1246 (10 Cir. 1974) 15

United States v. Fierson, 419 F.2d 1020 (7 Cir. 1970) ....

PAGE

United States v. Fontana, 231 F.2d 807 (3 Cir. 1965) 22

United States v. Hogan, 232 F.2d 905 (3 Cir. 1966) 21

United States v. Johnson, 515 F.2d 730 (7 Cir. 1975) 17

United States v. Levine, 569 F.2d 1175 (1 Cir. 1978) ..17, 18

United States v. Librach, 602 F.2d 165 (8 Cir. 1979) 24

United States v. McDaniels, 57 F.R.D. 171 (E.D. La 1972) 15

United States v. Partin, 493 F.2d 750 (6 Cir. 1974) 22

United States v. Russano, 257 F.2d 712 (2 Cir. 1958) .. 15

United States v. Varelli, 407 F.2d 735 (7 Cir. 1969) 15

Other Authorities

United States Constitution, Amend. V 18

United States Constitution, Amend. VI ..17, 19, 22, 23, 24, 25

18 U.S.C. 3500 ("Jencks Act") 4-5

Stevenson, R. L., *Virginibus Puerisque*, I, iv. "Truth of Intercourse," in OXFORD DICTIONARY OF QUOTATIONS (2d ed. 1953), 514:33 23

In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO.

FRANK SANTOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Frank Santos, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the First Circuit to review its decision affirming the judgment of the United States District Court for the District of Puerto Rico, entered upon a jury verdict finding him guilty of conspiracy (to distribute, etc., heroin).

Judgment and Order Below

On February 5, 1980, the Court of Appeals for the First Circuit affirmed the judgment below, No. 77-1383. A copy of that Court's Opinion, not yet reported, is attached as Appendix A.[1] Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on March 27, 1980. (App. B)

Jurisdiction of this Court

The judgment sought to be reviewed was entered on March 27, 1980, when the Petition for Rehearing was denied. This petition for Writ of Certiorari is filed within 30 days from said date. Jurisdiction of this Court is invoked under Title 28, U.S. Code, sec. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Where the Court of Appeals—agreeing with the contention of petitioner—determined that the November, 1976 transaction in Indiana involving Izzi and petitioner was *not* part of a single conspiracy as charged, therefore reversing Izzi's conviction:

(A) May petitioner's conviction nonetheless be permitted to stand, although his November connection

[1] Decided together with petitioner Santos' appeal were the appeals of three co-defendants convicted upon the same charge: Eugene J. Izzi, No. 77-1382; Alberto Cruz Fontanez, 77-1384; and Carlos Cuevas Morales, No. 77-1385. Only Izzi's conviction was reversed. The First Circuit's opinion, App. A, covers all the appeals. A major aspect of our petition to this Court involves the impact upon Santos' multiple-conspiracy argument of the reversal of Izzi's conviction.

with Izzi is the sole, unambiguous drug-related evidence against petitioner, all other incriminatory evidence against him being subject to innocent interpretation?

(B) Where, as here, the reviewing court has concluded that evidence was presented to the jury concerning a set of circumstances *outside* the scope of a single conspiracy as charged, did the court use an improper standard in determining, upon the facts, that petitioner was not prejudiced thereby?

(C) In being exposed to evidence of the November-Indiana transaction which was not properly a part of the conspiracy as charged, was not the jury thereby improperly exposed to evidence that petitioner participated in a separate, unrelated crime, to his manifest prejudice?

2. Where, after conviction, it became clear that the trial testimony of no less than four government witnesses to the November-Indiana incident had given grand jury testimony at variance with their in-court testimony—which grand jury testimony was not turned over to the defense at any time prior to conviction:

(A) Did the trial court commit prejudicial error and violate petitioner's constitutional rights—particularly, his right to effective cross-examination as guaranteed by the Sixth Amendment (and as effectuated in part by the Jencks Act)—by denying his motion for new trial based on the government's failure to furnish the said prior grand jury testimony, erroneously determining (i) that the non-disclosed material was not possibly impeaching, and (ii) that in any event, considering all the evidence, petitioner was not prejudiced by the non-disclosure?

(B) In light of the reviewing court's determination that the November-Indiana transaction was *not* a part of a single conspiracy as charged, is not that court's conclusion—affirming the trial court's finding that the government's failure to furnish the defense with the said grand jury testimony concerning that transaction prior to conviction was not prejudicial to petitioner—even more manifestly incorrect?

Constitutional Provisions and Statute Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be held to answer to a[n] . . . infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

Title 18, U.S. Code, sec. 3500,* provides in pertinent part:

---

* Although no question is raised concerning the constitutionality of the Jencks Act, the pertinent portions are included here inasmuch as the statute's proper application, in terms of remedies available for governmental non-compliance, is an issue encompassed within Point 2, *infra*. It is our position that regardless of the Jencks Act, however, petitioner's Sixth Amendment constitutional rights (to confrontation, vis â vis cross-examination) were violated by what transpired.

> "§ 3500. Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . .
>
> • • •
>
> (e) The term 'statement', as used . . . [above] in relation to any witness called by the United States, means—
>
> • • •
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

Statement of the Case

Petitioner, Frank Santos, was charged in indictment No. CR 76 187 with having conspired with a number of other individuals to possess heroin with intent to distribute same, to distribute heroin, and to aid and abet in distributing heroin.[2]

---

[2] In addition to the three co-defendants whose appeals were jointly decided with petitioner's, see footnote 1, p. 2, *supra*, six other alleged conspirators were named in the indictment but not prosecuted with the four appellants. See App. A, p. 2, fn. 1. Also, the indictment contained a second count (not naming petitioner).

Rejecting the contention of petitioner and other co-defendants that the November, 1976 Indiana incident was not a part of a single conspiracy as charged in the indictment, the court permitted the jury to consider evidence of that transaction.

Petitioner was found guilty by the jury. After conviction, it became evident that four government witnesses to the November-Indiana transaction had given in-court testimony at variance with their prior grand jury testimony, which had not duly been furnished to the defense.[3] The trial court denied petitioner's motion for new trial, concluding that the non-disclosed material was not impeaching, and that, in any event, considering all the evidence, petitioner had not been prejudiced by not having had the prior grand jury testimony of these witnesses available for purposes of cross-examination.

Petitioner was sentenced to 15 years imprisonment, a $15,000 fine, and a 6-year special parole term.

The Court of Appeals affirmed. (App. A)

---

[3] As stated by the First Circuit:

"The grand jury testimony of the witnesses [re the November-Indiana sale, which resulted in an indictment in the Northern District of Indiana—Somosa, Rios (Sanchez), and DEA agents Jorge and Jiminez] was given prior to the trial on the conspiracy charge in Puerto Rico. However, when the government . . . furnished the defendants with a number of statements and reports made by witnesses at the start of the trial in Puerto Rico, the grand jury statements of the four witnesses were not included. This omission came to light after the conspiracy trial had ended when Santos and Izzi were brought to trial in the Northern District of Indiana, and the Jencks Act material furnished them there contained the grand jury testimony. Upon examination, it was found to vary in some degree from the witnesses' court-room testimony in Puerto Rico." App. A, p. 13.

STATEMENT OF FACTS

The facts as set out in the Court of Appeals' opinion are extremely detailed, as is necessary for adequate consideration of the issues presented both in that Court and at bar. For the most part, that factual statement (App. A, pp. 3-8) is hereby adopted to avoid unnecessary duplication. In addition, the facts necessary to a determination of the questions herein presented are as follows:

Guillermo Rios Sanchez testified that in early April, 1976 he was a disc jockey in Puerto Rico and was introduced, by Alberto Cruz, to petitioner as a good man to handle the promotion of various dances which Santos sought to bring to Puerto Rico. Petitioner and Sanchez became (according to Sanchez) good friends because they were both in radio and had a mutual interest in the promotion of the dances. (Tr. 105-13; Tr. 289-90) In late April, 1976 Sanchez met Jesse DeJesus in connection with the presentation of the dances. (Tr. 123) Petitioner introduced him to DeJesus as a good commentator who could well promote the dances. (Tr. 124-25)

Sanchez testified that in late April, 1976, at the request of Jesse DeJesus, he went first to New York and then to Chicago to pick up heroin for DeJesus and return it to Puerto Rico and was accompanied on both trips by Luis Samosa. Upon completion of each of the trips, Sanchez delivered the heroin to defendant Cruz (Tr. 139-61; Tr. 223-25) as he had been directed to do by DeJesus.

Sanchez tried continuously to get paid by DeJesus and defendant Cuevas for his heroin transporting trips and was told by DeJesus that he was waiting to collect some money from "Frankie" and when he did he'd give Sanchez at least $6,500 to pay for part of the mortgage on his house

(which was the inducement to Sanchez to enter into the transactions). (Tr. 224-26)

Sanchez testified that *during all the times he met and spoke with petitioner there was never any discussion between them about drugs and that petitioner at no time ever mentioned drugs or narcotics.* The only conversations that petitioner had with Sanchez were regarding the promotion of the dances and his recommendation of Sanchez to DeJesus for that task. (Tr. 289-90)

Luis Samosa,[4] a crew manager for Eastern Airlines stationed in San Juan, testified that, at the request of Sanchez who had been so directed by DeJesus, he accompanied Sanchez on two trips to the United States (New York and Chicago) to pick up two kilos of cocaine.[5] (Tr. 361-67) Samosa received his compensation for these trips in the form of heroin, to sell, which, eventually, he did, to undercover DEA Agent McCarthy in exchange for $10,000 and, subsequent to which, he was arrested. (Tr. 384, 397)

Drug Enforcement Administration Agent Felix Jimenez testified that he traveled to Chicago on November 7, 1976 with then DEA informant Luis Samosa. (Tr. 441). After making a recorded telephone call to defendant, Jimenez and Samosa traveled to East Chicago, Indiana to "Frankie's

[4] Samosa testified at trial in a bifurcated manner—the first portion of his testimony relating primarily to the trips to the United States made in May of 1976, and the second part of his testimony relating to much later conversations and transactions with petitioner and Izzi in East Chicago, Indiana in November, 1976.

[5] Samosa testified that he originally had been led by Sanchez to believe the substance to be transported was cocaine rather than heroin, and that, had he known it was heroin, he never would have become involved. (Tr. 90)

Lounge" and Jimenez maintained surveillance while Samosa went inside. Defendant Izzi arrived about an hour after Samosa went into the bar. (Tr. 446) Jimenez surveilled for approximately four hours and when Samosa left the bar, he gave Jimenez heroin (Gov. Ex. 16). (Tr. 449)

On November 9, after calling petitioner, Jimenez and Samosa went to Hammond, Indiana with $19,000 in official advanced DEA funds. (Tr. 454) Samosa went into the bar, Izzi arrived, they (Samosa and Izzi) left together and eventually Samosa brought Jimenez a brown paper bag with three black cylinders which contained heroin. (Gov. Ex. 18). (Tr. 458) Jimenez testified he gave the $19,000 to Samosa who went inside of a restaurant with Izzi. The defense (including counsel for petitioner) did not cross-examine Agent Jimenez. (Tr. 470)[6]

Luis Samosa, upon being recalled by the government, testified that on August 20, 1976, in his role as an undercover informant for the Drug Enforcement Administration, he began recording conversations he had with petitioner. (Tr. 645) On November 7, he flew to Chicago with DEA Agent Jiminez and contacted petitioner and told him he was in town with a man who had $100,000 to invest. (Tr. 722-23) Petitioner instructed him as to how to get to Hammond, Indiana. Samosa traveled to Hammond and went to petitioner's bar and repeated his statement that he had a friend who had $100,000 to invest in heroin and cocaine. Petitioner introduced him to defendant Izzi (whom he had

[6] In this connection, see Point 2, *infra,* which relates to the failure of the government to provide defense counsel with Agent Jimenez' report which contained highly exculpatory material. Had petitioner had the benefit of such material at this point in the trial (or, for that matter, at *any point in the trial*), the result might well have been different.

then met for the first time) and Izzi told him he had three-quarters of a kilo of heroin for which he wanted $19,000. Samosa requested and received a sample (Gov. Ex. 16) from Izzi. (Tr. 733-37; Tr. 747)

On November 9, in a surveilled transaction, Samosa purchased three-quarters of a kilo of heroin from Izzi for $19,000. (Tr. 758-62)

Samosa testified to a subsequent series of tape recorded conversations in November and December with petitioner to the effect that Samosa and his friend were ready to make another buy. (Those tapes were introduced into evidence and played before the jury.) (Tr. 774-799)

On cross-examination, Samosa testified that if anyone in the case is lying it's Sanchez and not he (Samosa) (Tr. 831), and that he was arrested with respect to these matters in late June or early July and subsequent to that became an informant; that he upped his price for participating in the transactions to $9,000 when he told Sanchez that the bag containing the heroin felt more like twenty pounds than the four kilos he had been led to believe (Tr. 832); that he cannot say that he had seen Government Exhibit 3—a brown paper bag—before, since "all paper bags look alike" (Tr. 834); that he never dealt in narcotics before May, 1976 (Tr. 839); that he lied to Agent McCarthy when he told him he had dealt heavily in narcotics with the man from Miami (Tr. 839); that he was also lying to McCarthy when he told him he dealt in narcotics with the man who owned a gift shop in Curacao and that he had a cousin named Harry in Columbia who dealt in narcotics. Samosa stated that on the two smuggling occasions, he used the same smuggling techniques to smuggle narcotics into Puerto Rico and that those were the only two occasions he did that in his life. (Tr. 843)

Samosa testified that a man named Charles Ducros—whom he knew to be in the narcotics business as well as guns and ammunition—who worked for Eastern Airlines, introduced him to undercover Agent McCarthy in reference to the sale he subsequently made to McCarthy. (Tr. 860) While transacting the heroin sale to McCarthy, Samosa also told him that he could sell him $2,000 worth of stolen American Express money orders for $1,000 and proceeded to give McCarthy a sample of the stolen money orders. (Tr. 866) McCarthy gave him approximately $10,000 for the heroin and he (Samosa) gave Sanchez $9,700, keeping only $300 for himself—this in spite of the fact that he traveled to New York and Chicago, took time off from work, smuggled what he believed to be heroin from New York to Chicago to Puerto Rico and realized that it was a dangerous enterprise. (Tr. 871-73)

After being arrested by the DEA, Samosa became an informant for them and made recorded telephone calls to petitioner to the extent of four or five such calls from August 20 to 31. He made possibly as many as fifteen calls in each of September and October, 1976. (Tr. 892) After November 9, Samosa kept calling petitioner in November and December trying to set up a $100,000 sale, but petitioner told him there was none available at that time. (Tr. 898)

• • •

With respect to other testimony about which petitioner raises specific points or wishes to draw to the Court's attention, such facts as are necessary for an evaluation of the issues are contained within the pertinent points of the argument which follows.

REASONS FOR GRANTING THE WRIT

1.

The First Circuit having determined that the November transaction in Indiana involving Izzi and petitioner was not a part of a single conspiracy as charged, therefore reversing Izzi's conviction:

(A) Petitioner's conviction should likewise be reversed, inasmuch as his November connection with Izzi is the sole, unambiguous drug-related evidence against petitioner, all other incriminatory evidence against him being subject to innocent interpretation;

(B) Where the reviewing court has concluded that evidence was presented to the jury concerning a set of circumstances outside the scope of a single conspiracy as charged, that court's determination, upon the facts, that petitioner was not prejudiced thereby, was reached by use of an improper standard;

(C) In being exposed to evidence of the November-Indiana transaction which was not properly a part of the conspiracy as charged, the jury was thereby improperly exposed to evidence that petitioner participated in a separate, unrelated crime, to his manifest prejudice.

Certiorari should be allowed so that this Court may direct itself to the increasingly prevalent problem, so frequently encountered in complicated conspiracy prosecutions, of introduction of evidence outside the scope of a single conspiracy as charged, and, more particularly, deal with important questions as to the proper, constitutionally mandated methods of assessing the fairness of a conspiracy trial at which such extra-conspiracy evidence has been admitted.

The Court of Appeals has agreed with petitioner's contention that the evidence disclosed not one conspiracy, as charged, but rather, a conspiracy which ended not later than August 20, 1976. (Sl. Op. p. 8; App. 8) Thus, the evidence concerning the November incident involving Izzi, petitioner and Samosa in Indiana was evidence of a separate offense not encompassed within the single conspiracy charged in the indictment. (Sl. Op. p. 9; App. 9) Indeed, the court hesitates even to find a separate conspiracy in November, alternately viewing that transaction as a separate, substantive offense. (*Ibid.*)

However, although the Court of Appeals reversed Izzi's conviction on grounds the jury improperly considered against him evidence of this November incident, (Sl. Op. p. 10, App. 10), it affirmed as to petitioner, finding no prejudice as to him.

The logic utilized by the court in reversing Izzi's but affirming petitioner's conviction defies any but bootstrap analysis; for it runs like this: Because the only involvement of Izzi was in the November incident,[7] he must have been prejudiced by the jury's having heard the improper evidence not contained within the single conspiracy as alleged; but since petitioner was "clearly part of the April to August conspiracy," (Sl. Op. p. 11; App. 11), he was not prejudiced by the jury's consideration of this improper evidence.

But it is not so simple as it appears.

---

[7] ". . . [W]hether we treat the November sale as a culmination of conspiracy or simply a substantive crime, there is no evidence linking Izzi to the conspiracy that started at the end of April. Izzi's name was not mentioned at all by the other conspirators at any time and he did not enter the picture until the November sale in East Chicago [Indiana]." (Sl. Op. p. 9; App. 9)

The evidence of petitioner's participation in the "April to August" conspiracy is far from clear, no matter how characterized by the First Circuit. *The sole and only unambiguous, drug-related incident involving petitioner is the November transaction which the reviewing court ruled was not properly a part of the case.*[8] Every other bit of evidence against him, though arguably inferentially incriminatory, is consistent with innocence.

Only a seer could purport to divine that the jurors' verdict that petitioner was guilty of conspiracy was *not* influenced by their consideration of the improper evidence of the November sale.

Conceding that "the government may have proved too much as far as Santos is concerned," (Sl. Op. p. 11; App. 11), the First Circuit leaps the evidentiary gap (*cf.* Sl. Op. p. 10; App. 10) backwards, concluding that since "he [Santos] was clearly part of the April to August conspiracy," and "the fact that Santos sold heroin to Somosa in November does not erase the evidence as to his participation in the earlier conspiracy," (Sl. Op. p. 11; App. 11), that petitioner was not prejudiced. But again, this conclusion presupposes what, we submit, may *not* be assumed: namely, that the jury must have agreed with the reviewing court that the evidence against petitioner, aside from the November incident, was sufficient to prove his guilt of the earlier conspiracy. There is simply no way of knowing that this is true; and since it may well *not* be true, it is improper simply to conclude that petitioner was not prejudiced.

---

[8] Moreover, petitioner's second contention in this Court—see Point 2, *infra*—involves improper governmental non-disclosure of prior inconsistent grand jury testimony of no less than four witnesses to that very incident.

Moreover, that Izzi was convicted is convincing proof that the jury *did* in fact give credence and consideration to the evidence of the November sale. (See Sl. Op. p. 10; App. 10) *If they considered it as to Izzi, is it not reasonable to assume they considered it as to petitioner as well?*

• • •

Once the First Circuit determined that the November transaction was not a part of the single conspiracy charged, the court's conclusion of "no prejudice" to petitioner is contrary to prevailing federal standards respecting the assessment of the prejudicial impact of error. In the light of the factual framework as here presented, this decision is so at variance with a proper view of the law that this Court should undertake to consider the issue, so as to set an example for reviewing courts and to iterate standards for trial courts with respect to the increasingly prevalent problem involving jury exposure to extra-conspiracy evidence.

This Court unequivocally has held that where multiple conspiracies are shown while a single one was charged, a conviction cannot stand if the jury *may have* considered against a defendant, acts and declarations of others done in furtherance of one or more of the separate conspiracies. *Kotteakos* v. *United States*, 328 U.S. 750 (1946).[9] Here, petitioner was subjected—by virtue of the erroneous

---

[9] See also *United States* v. *Varelli*, 407 F.2d 735, 741-44 (7 Cir. 1969); *Daily* v. *United States*, 282 F.2d 818, 821-22 (9 Cir. 1960); *Canella* v. *United States*, 157 F.2d 470, 477-78 (9 Cir. 1946); *Rocha* v. *United States*, 288 F.2d 545, 551-53 (9 Cir. 1961); *Fernandez* v. *United States*, 329 F.2d 899, 904-05 (9 Cir. 1964); *Brooks* v. *United States*, 164 F.2d 142 (5 Cir. 1947); *United States* v. *Russano*, 257 F.2d 712, 715-16 (2 Cir. 1958); *United States* v. *Butler*, 494 F.2d 1246, 1254-57 (10 Cir. 1974). And see *United States* v. *McDaniels*, 57 F.R.D. 171, 176 (E.D. La. 1972).

"single conspiracy" theory--to voluminous evidence respecting unconnected crimes in which he played no part; thus was the jury allowed, if not directed, to transfer the guilt of Cuevas, Cruz and DeJesus, to petitioner, thereby causing prejudice which should have precluded affirmance. See *United States* v. *Bertolotti,* 529 F.2d 149 (2 Cir. 1975).

The First Circuit's reliance on petitioner's allegedly "clearly [being] part" of the earlier conspiracy is misplaced; indeed, the Ninth Circuit has held that even one who was a party to *all* of a number of separate conspiracies may not stand convicted therefor upon an indictment charging but a single conspiracy.[10] The instant decision thus reflects a conflict betwixt these Circuits.

---

[10] In *Fernandez* v. *United States,* 329 F.2d 899 (9 Cir. 1964), after reversing the convictions of two appellants who were shown to have been involved, at most, in conspiracies separate from the single one charged and not knowledgeable of any single conspiracy, the court proceeded also to reverse the conspiracy conviction of the most heavily involved of the defendants, characterized as the "mastermind," because of a fatal variance:

> "As for Fernandez, there is evidence connecting him with all of the substantive counts. And to the extent that there was a conspiracy, or were conspiracies, between two or more persons in connection with these and similar transactions, he, as the so-called 'mastermind,' was a direct participant therein, knew of any such conspiracy or conspiracies, and was aware of their nature and purpose.
>
> "But there is nevertheless *wholly lacking any evidence showing that there was a single over-all conspiracy to engage in these separate and distinct transactions which occurred at different times and places and involved varying persons and methods of operation. At most, the evidence establishes several diverse conspiracies radiating from Fernandez in all of which he participated,* and in one or two of which Dalgliesh and Pratt participated. *This being true, the conviction on the conspiracy count cannot stand even as to Fernandez* and, on this additional ground, it cannot stand as to Dalgliesh and Pratt." *Id.* at 905. (Footnote omitted; emphasis added).

Here, as in *United States* v. *Johnson,* 515 F.2d 730 (7 Cir. 1975), where the Seventh Circuit held as a matter of law that separate conspiracies, rather than the single one alleged, had been demonstrated by the evidence, the Court of Appeals at bar should have concluded that petitioner was damaged by the improper "spill-over" effect. Again, comparison of petitioner's case with *Johnson* demonstrates another aspect of a conflict between the various Circuits as to ultimate disposition of cases involving extra-conspiracy evidence which is outside the charged conspiracy as a matter of law.

Moreover:

> "[W]here one general conspiracy is charged, proof of several conspiracies constitutes a variance, and . . . the harmless error rule . . . will not save a reversal where it is not made clear that no prejudice has resulted from the error." *Brooks* v. *United States,* 164 F.2d 142, 142 (5 Cir. 1947) (reversing).

In contrast with another First Circuit decision, *United States* v. *Levine,* 569 F.2d 1175 (1 Cir. 1978), the factual setting of which permitted affirmance, here the opportunity for significant prejudice from the improper variance was great.[11]

* * * .

Finally, the First Circuit's (alternative) view that the November incident, rather than constituting a "separate conspiracy," may have been a separate substantive offense, (Sl. Op. p. 9; App. 9), demonstrates an additional facet

---

[11] Additionally, petitioner's conviction violates Sixth Amendment principles and guarantees concerning right to indictment by a grand jury, see *Stirone* v. *United States,* 361 U.S. 212 (1960), if indeed he was convicted upon a theory other than that upon which he was indicted.

of the prejudice suffered by petitioner which could not be formulated until after the court thus had spoken; for now, this amounts to having allowed the jury to hear evidence of a separate substantive offense, not admissible under any arguable exception to the general rule forbidding such evidence, not subject to the "usual" precautions and limitations, and directly violative of the principles underlying such decisions as this Court's pronouncement in *Michelson* v. *United States*, 335 U.S. 469 (1948).

> "This rule [that evidence of specific uncharged offenses is incompetent and inadmissible to prove the crime charged] reflects a firmly rooted notion of our jurisprudence—a man ought not be convicted of doing a specific bad act because he is a bad fellow generally." *United States* v. *Fierson*, 419 F.2d 1020, 1022 (7 Cir. 1970).

We cannot over-stress: The jury was affected by the November evidence as to Izzi. Who can say they were not similarly affected as to petitioner?

Once one perceives that petitioner's "guilt" as to the April-August conspiracy is not nearly so clear or cut and dried as the First Circuit would have it,[12] the probability that the verdict may have been influenced by the improperly presented November evidence is seen to be "significant."[13] Accordingly, petitioner was deprived of a trial that could be characterized as constitutionally "fair" as guaranteed by the due process clause of the Fifth Amendment.

* * *

[12] See Statement of Facts, pp. 7-11, *supra*.

[13] *Cf. United States* v. *Levine*, *supra*.

In the light of the reviewing court's determination that the November evidence—*as a matter of law*—was outside the scope of a single conspiracy as charged, certiorari should be allowed to permit this Court to address itself to the important questions encompassed within this Point, keeping in mind that the instant decision violates this Court's precepts as enunciated in *Kotteakos, supra*, and conflicts with similar decisions from various other Circuits. On the merits, we urge the Court to find that petitioner was indeed prejudiced by the jury's improper consideration of extra-conspiracy evidence, a conclusion which seems inexorable in the face of the reviewing court's reversal of Izzi's conviction.

2.

Where, after conviction, it became clear that the trial testimony of no less than four government witnesses to the November-Indiana incident had given grand jury testimony at variance with their in-court testimony—which grand jury testimony was not turned over to the defense at any time prior to conviction:

> **(A) The trial court committed prejudicial error and violated petitioner's constitutional rights—particularly, his right to effective cross-examination as guaranteed by the Sixth Amendment (and as effectuated in part by the Jencks Act)—by denying his motion for new trial based on the government's failure to furnish the said prior grand jury testimony, erroneously determining (i) that the non-disclosed material was not possibly impeaching, and (ii) that in any event, considering all the evidence, petitioner was not prejudiced by the non-disclosure;**

(B) In light of the reviewing court's determination that the November-Indiana transaction was not a part of a single conspiracy as charged, that court's conclusion—affirming the trial court's finding that the prosecution's failure to furnish the defense with the said grand jury testimony concerning that very transaction prior to conviction, was not prejudicial to petitioner—is even more manifestly erroneous.

Certiorari should be allowed so that this Court may expound on its holdings in Brady v. Maryland, 373 U.S. 83, and United States v. Agurs, 427 U.S. 97, as applied to the government's negligent non-disclosure of properly producible material, and, further, set forth standards concerning what material is "possibly impeaching."

Even before the First Circuit ruled that the November-Indiana incident was not properly part of the case, petitioner forcefully argued that the prosecution's non-disclosure of the grand jury testimony of four of its witnesses (at variance with their in-court testimony) was prejudicial, so that his motion for new trial should have been allowed.[14]

---

[14] Factually, this came to light thus, per the First Circuit:

"The grand jury testimony of the witness [*re* the November-Indiana sale, which resulted in an indictment in the Northern District of Indiana] [Somosa, Rios (Sanchez), and DEA agents Jorge and Jiminez] was given prior to the trial on the conspiracy charge in Puerto Rico. However, when the government . . . furnished the defendants with a number of statements and reports made by witnesses at the start of the trial in Puerto Rico, the grand jury statements of the four witnesses were not included. This omission came to light after the conspiracy trial had ended when Santos and Izzi were brought to trial in the Northern District of Indiana, and the Jencks Act material furnished them there contained the grand jury testimony. Upon examination, it was found to vary in some degree from the witnesses' courtroom testimony in Puerto Rico." (Sl. Op. p. 13, App. 13)

Now that the reviewing court has eliminated that incident from what properly should have been considered—and it is reasonable to infer, from the fact that Izzi was convicted, that the jury did consider this evidence[15]—the impact of petitioner's inability properly to cross-examine four of the witnesses to that incident becomes so magnified that prejudice is extremely probable, if not inevitable.

But even aside from that aspect of this issue, the First Circuit has utilized a palpably erroneous standard in determining that the material had no significant impeachment value. In so ruling, the court has disregarded a compelling line of cases holding that impeachment value of possibly impeaching material is solely a jury question.[16]

---

[15] See pp. 13-18, *supra*, Point 1 of this Petition.

[16] In *Davis* v. *Alaska*, 415 U.S. 308, 317-18 (1974), Your Honors held:

". . . to make any such inquiry effective, *defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the credibility of the witnesses.* Petitioner was thus denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 318. (Emphasis added.)

In *United States* v. *Barash*, 365 F.2d 395 (2 Cir. 1966), the court reversed for improper restriction of extrinsic impeachment of a crucial government witness, commenting on the possible effect of such evidence upon the jury as follows:

"For the defense to establish that Clyne had lied about not making threats would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all." *Id.* at 401.

See also *United States* v. *Hogan*, 232 F.2d 905 (3 Cir. 1966).

(footnote continued)

Even though the prosecution's failure to disclose this unquestionably producible material may have been grossly negligent or merely inadvertent, so far as the individual prosecutor is concerned, petitioner's rights under the Sixth Amendment cannot thus be circumscribed.[17] In many contexts, the prosecution is held accountable for knowledge within the cognizance of government agents;[18] here, two of the witnesses whose grand jury testimony was not turned over to the defense were DEA agents.

The test applied by the reviewing court rests upon the improper conclusion that the jury must have had the same

(footnote continued)

Highlighting the true issue—that is, that it is up to the jury, and no one else, to assess the impeachment value of purported impeachment evidence—are *United States* v. *Borelli,* 336 F.2d 376 (2 Cir. 1964), and *United States* v. *Partin,* 493 F.2d 750 (6 Cir. 1974).

In *Borelli,* the court reversed, holding that the trial court should have let the jury see the prior statements of a crucial government witness because the court ". . . could hardly be certain that the error might not have affected . . . defendants." 336 F.2d at 391.

In *United States* v. *Fontana,* 231 F.2d 807, 809-12 (3 Cir. 1965), although some differences between the crucial government witness' trial testimony and his allegedly prior inconsistent statements were minor, the reviewing court reversed for the trial court's refusal to allow this witness to be cross-examined as to such statements; defendant had a right to cross-examine the witness concerning them, leaving it to the jury to determine their impeachment value, if any.

[17] *Cf. Franks* v. *Delaware,* 438 U.S. 154 (1978) (government may not benefit from court order procured by court's reliance upon material facts either intentionally or recklessly misrepresented by prosecution.).

[18] See *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *Pyle* v. *Kansas,* 317 U.S. 213 (1942); *Curran* v. *Delaware,* 259 F.2d 707, 712-13 (3 Cir. 1958); *Barbee* v. *Warden,* 331 F.2d 842, 846 (4 Cir. 1964).

view of the evidence as did that court—that is, that petitioner was "clearly" tied to the April to August conspiracy. But, as pointed out in Point 1, *supra,* this is far from clear; and it is even less clear that the jury necessarily took the same position as did the court regarding the strength of the pre-November evidence against petitioner.

Remember—*the witnesses* as to whom impeachment improperly was not allowed because their prior grand jury testimony was not turned over to the defense until after conviction, *all testified as to that November-Indiana incident which, per the reviewing court, should not have come before the jury at all.* Thus, petitioner's inability to impeach these witnesses rendered it even *more* likely that the jury would utilize evidence of the November transaction in deciding that petitioner was guilty of conspiracy.

* * *

The standard employed by the First Circuit is so strict against the accused that it threatens to emasculate the Sixth Amendment and the Jencks Act, insofar as that statute seeks to implement the constitutional protection.

First, the reviewing court seems to overlook that it is dealing with sensitive, constitutional rights, speaking instead in terms of the necessity of imposing "sanctions" against the government. (Sl. Op. p. 15; App. 15) Whether intentional, grossly negligent, or inadvertent,[19] the prosecution's non-disclosure fatally infected petitioner's right to a fair trial. See *Barbee* v. *Warden,* fn. 18, *supra.*[20]

[19] See fn. 17, *supra,* and *Barbee* v. *Warden, supra.*

[20] Robert Louis Stevenson's timeless oxymoron has never rung more true: "The cruellest lies are often told in silence." Stevenson, *Virginibus Puerisque,* I, iv, "Truth of Intercourse," in OXFORD DICTIONARY OF QUOTATIONS (2d ed. 1943), 514:33, quoted (without credit) in *Barbee* v. *Warden, supra,* 331 F.2d at 846.

Secondly, in holding that the material in question was covered *only* by the Jencks Act and not by the *Brady* doctrine[21] to enforce Sixth Amendment rights, (Sl. Op. pp. 14-15; App. 15), the court has usurped the jury's paramount role in assessing impeachment value;[22] for, after all, if the jury determined that the witnesses' in-court testimony had been impeached by their prior inconsistent grand jury testimony, then this impeachment could induce them to disbelieve these witnesses and therefore not to convict petitioner; in other words, it would thus amount to "exculpatory evidence" within the meaning of *Brady*. The reviewing court's decision to the contrary, drawing an artificial and invalid distinction between material which is "exculpatory" and that which is "merely" impeaching, disregards the jury's exclusive rule in assessing impeachment value.

Finally, the First Circuit's holding fails to follow standards heretofore prescribed by this Court for dealing with non-disclosure situations, namely, that a defendant's conviction should be reversed where there was prosecutorial non-disclosure of possibly impeaching evidence, if the non-disclosed evidence, if known by the fact-finder, "might have affected" the result. *United States* v. *Agurs*, 427 U.S. 97, 104 (1976); *accord, United States* v. *Librach*, 602 F.2d 165 (8 Cir. 1979).[23]

• • •

---

[21] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[22] See fn. 16, *supra*.

[23] Moreover, aside from the exculpatory and impeachment value of the prior inconsistent grand jury testimony of these four witnesses to the November-Indiana transaction, it must be remembered that defense counsel were not apprised *at all* of the existence, let alone substance, of this testimony; consequently, petitioner's entire theory and strategy at trial was necessarily distorted and his chances of acquittal substantially diminished. See fn. 20, *supra*.

Because the First Circuit's ruling on the *Brady*-Jencks Act issue manifestly perpetuates the error of having exposed the jury to the November-Indiana evidence, and for all the other reasons set forth above, certiorari should be allowed, lest prosecutorial negligence be permitted to strip defendant of his most basic, Sixth Amendment rights.

CONCLUSION

The unique situation here—where the *only* unequivocally drug-related evidence as to petitioner was held by the Court of Appeals to be a separate transaction not covered by the indictment conspiracy—presents important issues as to methods of assessing the fairness of a conspiracy trial at which evidence of an unrelated sale is in evidence. The increasing prosecutorial use of "conspiracy" theory, and the ease with which a defendant's fundamental rights can thereby be curtailed—as demonstrated by the case at bar—render the cause worthy of certiorari.

The far-reaching questions concerning the prosecutor's failure to turn over clearly discoverable material to the defense at the only time it could do any good, likewise deserve Your Honors' consideration.

• • •

For any or all of the foregoing reasons, certiorari should be allowed; and, upon consideration of the merits of the cause, petitioner's conviction should be reversed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
MICHAEL CHERONIS
CAROLINE JAFFE

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 77-1382

UNITED STATES OF AMERICA,

APPELLEE,

v.

EUGENE J. IZZI, A/K/A GINO,

DEFENDANT-APPELLANT.

No. 77-1383

UNITED STATES OF AMERICA,

APPELLEE,

v.

FRANK SANTOS, A/K/A FRANKIE RUBIROSO, A/K/A EFRAIN SANTOS,

DEFENDANT-APPELLANT.

No. 77-1384

UNITED STATES OF AMERICA,

APPELLEE,

v.

ALBERTO CRUZ FONTANEZ,

DEFENDANT-APPELLANT.

No. 77-1385

UNITED STATES OF AMERICA,

APPELLEE,

v.

CARLOS CUEVAS MORALES,

DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[HON. JUAN R. TORRUELLA, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Carlos V. Garcia Gutierrez for appellant, Eugene J. Izzi.

Julius Lucius Echeles, with whom *Michael G. Cheronis* was on brief, for appellant, Frank Santos.

Gerardo Ortiz Del Rivero for appellant, Carlos Cuevas-Morales.

William C. Brown, Attorney, Department of Justice, with whom *Jose A. Quiles*, United States Attorney, was on brief for appellee.

February 5, 1980

BOWNES, *Circuit Judge*. This appeal is brought by Frank Santos, Eugene Izzi, Alberto Cruz-Fontanez (Cruz), and Carlos Cuevas-Morales (Cuevas),[1] who were convicted by a jury of conspiracy to possess with intent to distribute heroin and to distribute and to aid and abet in distributing heroin "from on or about the first day of April, 1976, and continuously thereafter up to and including the 20th day of December, 1976, in the District of Puerto Rico and elsewhere." Count I of Indictment. Cruz was also convicted of the substantive crime of distributing heroin on May 17, 1976, in violation of 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2. Count II of Indictment.[2]

There are three main issues.

1. Was the evidence sufficient to establish a single conspiracy covering the period from April, 1976, through December 20, 1976?

2. Did the district court err in allowing in evidence the statements of coconspirators?

3. Was the government's failure to turn over to defendants at trial certain alleged Jencks Act material reversible error?

I. *The Conspiracy*

Our review of the evidence must be made in light most favorable to the government, "together with all legitimate

---

[1] Six other alleged conspirators were named in the indictment, but not prosecuted with appellants.

[2] Jessie de Jesus was also named as an offender in Count II.

inferences to be drawn therefrom." *United States* v. *Doran*, 483 F.2d 369, 372 (1st Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), *United States* v. *Gabriner*, 571 F.2d 48 (1st Cir. 1978).

The testimony at the trial chiefly came from Guillermo Rios Sanchez (Rios), an unindicted member of the conspiracy, Louis Somosa, originally part of the conspiracy and then a government informant, Drug Enforcement Agents, and tapes of telephone conversations and recordings of statements made to Somosa who was fitted with a transmitter at various times.

The first step towards the conspiracy took place at the end of April, 1976, when Rios, who was a radio disc jockey, was approached by Cruz ostensibly concerning the joint promotion of dances in Puerto Rico featuring bands from the United States. Cruz suggested that Rios meet him at the Holiday Inn so he could meet some people who were going to present dances in Puerto Rico. At the Holiday Inn, Rios was introduced to Santos, who told him that he did radio work in Chicago, that he had friends who were interested in having dances promoted, and that he would see to it that Rios did the promoting. Santos subsequently introduced Rios to Cuevas and Jessie de Jesus, one of the indicted conspirators not tried along with appellants. Rios was told that de Jesus was the one in charge of bringing the dances to Puerto Rico.

de Jesus, Cruz, and Santos asked Rios if he knew anyone who worked at the airport with the necessary connections to obtain tickets whenever needed and who could obtain first class reservations. Rios introduced them to a friend of his, Louis Somosa, who worked as senior crew manager for Eastern Airlines. Santos returned to Chicago a few days later.

About the middle of May, de Jesus told Rios to buy twenty-seven airline tickets for musicians to come from New York to San Juan and then to meet him at his apartment. When Rios got to the apartment, de Jesus told him that the tickets would have to be taken to New York and Rios would be paid well for the trip. de Jesus also told Rios

that he was going to help with the mortgages on his house.[3] He then told Rios that, after he delivered the tickets to the musicians, he should wait for a day and bring back a package of "perico basura, garbage." It is clear that Rios understood that de Jesus was referring to heroin. Rios told de Jesus that he did not dare do this, but had a friend who would. Rios immediately, and in de Jesus' presence, called Somosa and explained what de Jesus wanted done. Somosa agreed to be the courier. de Jesus told Rios to deliver the package to Cruz after he returned from New York.

Rios and Somosa proceeded to New York where a package of heroin was delivered to Rios at the Harlem Medical Center by one Alice, allegedly the niece of de Jesus. The package consisted of a shopping bag with round black cylinders, each of which contained heroin. The cylinders were made of black masking tape wrapped around tinfoil which held plastic bags of heroin. Rios turned the package over to Somosa who carried it aboard the plane inside a plastic shopping bag. After arriving back in San Juan, Rios called Cruz and told him the package had arrived. Rios then delivered the package to Cruz at Cruz' apartment. Cruz told him that he had done a good job and not to worry, that he was not going to lose his house. Somosa subsequently called Cruz and told him he wanted $9,000 either in cash or "garbage." Rios communicated this to Cruz who gave him a package of heroin which Rios turned over to Somosa.

A short time later, Rios went to de Jesus' apartment. de Jesus told Cuevas, who was there, that Rios was the one who had brought the package down from New York, whereupon Cuevas patted him and said "good work."

During the third week of May, de Jesus asked Rios to come to his apartment. When he arrived, a Tommy Senteno[4]

[3] Rios had gone through a divorce and incurred debts in order to meet alimony and support payments. This resulted in three mortgages on his home.

[4] Senteno was at most of the meetings but does not figure in the case at all.

was there as was de Jesus' wife, Carmen. de Jesus asked Rios to go to Chicago and New York with Somosa and pick up some "garbage." He told Rios to use the word "musicians" as a code for heroin. Rios was also told that Carmen would be in charge of delivering the merchandise in Chicago. de Jesus also told Rios that $9,000 was too high a payment for Somosa. Rios called Somosa at Eastern Airlines, who put a minimum price of $6,000 on his services. de Jesus again promised Rios that he wouldn't have to worry about losing his house and that he would be paid for promoting the dances.

Rios and Somosa flew to Chicago on May 22 where they picked up a suitcase for delivery to New York and a shopping bag for Puerto Rico. The suitcase and shopping bag contained heroin packaged in about forty black cylinders of the same type that was used to make up the first New York package. Rios and Somosa delivered the suitcase to de Jesus' sister at her apartment in New York. They then flew back to San Juan with the shopping bag. Rios called Cruz on his arrival and was told to keep the package temporarily. After several days, the shopping bag was delivered to Cruz who put it in de Jesus' automobile.

Rios, according to his testimony,[5] had difficulty getting paid and went to Cuevas and complained. Cuevas said he would speak to Cruz and de Jesus. Cuevas subsequently told Rios that they did not want to have anything to do with him. Later, de Jesus told Rios in Cruz' presence that he was sending Cruz to Chicago to collect payments from Santos for some merchandise and Crus would pay Rios $6,500 on his return. A few days later, Rios met Cruz and Cuevas at a restaurant. They gave him $1,800 and told him that was all he was going to get. There was evidence by the way of telephone records that, before each of the trips by Rios and Somosa, de Jesus had called Santos in Chicago.

[5] Somosa testified on cross-examination that he sold the heroin given to him in payment for the first trip for $10,000, out of which he kept $300 and gave the balance of $9,700 to Rios.

On June 15, Somosa met with two DEA agents disguised as hippies at the Holiday Inn in Isla Verde for the purpose of selling the heroin given to him after the first New York trip. The sale was made for $10,000. When Somosa was arrested seven weeks later, he agreed to do undercover work and have his conversations recorded.

Santos returned to Puerto Rico on August 9 and stayed until August 20. Somosa, under surveillance and wearing a recording device, met with Santos at the airport on August 20, the day of his flight back to Chicago. Santos stated that he had straightened out some problems with Cuevas and Cruz and that Cruz had been thrown out of the organization. Santos also told Somosa that he would put him in good standing with de Jesus as a courier and that if de Jesus was not able to use him, he would connect him with somebody in Chicago so Somosa could buy dope. Somosa called Santos in Chicago the following day from a DEA phone and asked him about de Jesus. Santos told him that he had spoken to de Jesus and put Somosa in good standing.

Somosa went to Chicago in November pursuant to DEA instructions. He called Santos three times on November 8 from the DEA regional office. During these recorded calls, which were introduced in evidence, Somosa told Santos that he was in Chicago with a man who had $100,000 to invest. Arrangements were made to meet with Santos at "Frank and Pat's Lounge," located in East Chicago, Indiana. A transmitter was installed on Somosa and he proceeded to the meeting place under surveillance. At the lounge, Somosa met Santos and Izzi and was informed that Izzi had some cocaine and "three-quarters of a kilo of heroin" that was for sale for $19,000. Samples of both drugs were shown to Somosa. The heroin was packaged in plastic bags wrapped in black cylinders made of black masking tape and tinfoil similar to the cylinders Somosa had picked up in New York and Chicago in May. Somosa kept a small sample of the cocaine and heroin which was turned over to the DEA agents. A field test showed the sample to be as

represented. Somosa called Santos several times that day the DEA agents. A field test showed the samples to be as told that the cocaine had been sold, but the heroin could be delivered the next day for $19,000.

The next morning, after another recorded phone call, Somosa and DEA Agent Jimenez went to Frank and Pat's Lounge. Somosa went in and called Santos. Izzi arrived in about fifteen minutes and asked Somosa to take a ride with him in his Cadillac. They drove around the corner and Izzi parked and gave Somosa a paper bag containing three cylinders of heroin. Somosa took the heroin to Jimenez who gave him $19,000 which Somosa turned over to Izzi. After the transaction was completed, Izzi said that more sales could be made and all that Somosa had to do was contact Santos and tell him the quantity needed and when Somosa would be in town.

Somosa subsequently returned to Puerto Rico. On November 30, he called Santos in an ostensible attempt to buy five kilos of heroin. The call was made on a DEA phone. Santos told him to get in touch with the "man," meaning de Jesus, at the Club in Puerto Rico, but not to talk to anyone else. In subsequent recorded conversations, Somosa and Santos talked about their inability to speak to de Jesus about the deal. The last recorded telephone conversation between Somosa and Santos was on December 13, 1976. Santos told Somosa that Izzi had contacted de Jesus and was planning to pick him up at the Chicago airport.

Based on the foregoing facts, it is abundantly clear that Rios, Somosa, Cruz, and de Jesus were part of a conspiracy, formed at the end of April, to import heroin into Puerto Rico for distribution. The evidence as to Santos not only puts him well within the periphery of the scheme to use Rios and Somosa as dope runners for de Jesus, but is a solid basis for an inference that he was, at least, one of the suppliers. Cruz introduced Rios to Santos early on, and Santos in turn introduced Rios to de Jesus, the key man in the conspiracy. de Jesus told Rios that he was sending Cruz to Chicago to collect payments due from

Santos out of which Cruz would be paid. There was evidence that phone calls were made by deJesus to Santos just prior to the New York and Chicago-New York trips. The recorded conversation at the airport on August 20 established that Santos had played an important role in straightening out some difficulties with Cuevas and throwing Cruz out of the organization.

While the evidence as to Cuevas does not implicate him as deeply as the others, it establishes conclusively that he was a knowing participant. He and de Jesus were introduced to Rios by Santos at the Holiday Inn later in April. He complimented Rios for his "good work" in bringing the first package of heroin back from New York. It was Cuevas to whom Rios complained about not being paid and, most significantly, Cuevas, along with Cruz, paid Rios $1,800 for his work as heroin courier.

The necessary components of conspiracy to possess and distribute heroin in Puerto Rico starting at the end of April was established as to Cruz, Santos, and Cuevas. There was a common plan and purpose of which all three had knowledge and each of them participated in the conspiracy to some extent.

The question is when the conspiracy terminated. Or to put it another way, did it continue into November and December as the indictment charges and the government urges? After August 20, there was a hiatus of activity by de Jesus and members of his organization, at least as far as the evidence shows. In early November, Somosa went to Chicago to contact Santos. This was done, not at the request of de Jesus or any member of the organization, but at the instigation of the government. When Somosa called Santos in Chicago, he told him that he had a man with $100,000 to invest. This obviously was not a continuance of the May conspiracy which had been orchestrated by de Jesus. It was not part of any plan by de Jesus, Santos, et al. to bring heroin into Puerto Rico. It was part of a government plan to obtain evidence against Santos and his supplier. The prime mover in this venture was not de Jesus, but the DEA acting through Somosa.

The government argues that evidence of telephone calls made from Puerto Rico by Cuevas on October 4 and 6 to Santos in Chicago and de Jesus in New York indicates a continuing conspiracy. These calls were not tapped and, therefore, their contents are not known. While it may be inferred that the calls concerned drugs, that is as far as any inference can take us. They are not evidence of a link between Santos, de Jesus, and Somosa's November trip to Chicago. Nor does the evidence of the December calls from Somosa to Santos forge a connection between the November purchase from Santos and Izzi and the conspiracy that started in late April. All they show is an attempt by Somosa to purchase five kilograms of heroin from either Santos or de Jesus. Based on the evidence, we can only conclude that there was a conspiracy to possess and distribute heroin involving Cruz, Santos, and Cuevas which commenced in late April of 1976 and terminated on August 20.

Indeed, the evidence is slim that there was any kind of a conspiracy in November among Somosa, Izzi, and Santos. A single sale of drugs without more does not establish a conspiracy. *United States* v. *Mancillas*. 580 F.2d 1301, 1307 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978); *United States* v. *Varelli*, 407 F.2d 735, 748 (7th Cir. 1969), *cert. denied sub nom. Saletko* v. *United States*, 405 U.S. 1040 (1972). There must be an agreement by the parties, not merely a getting together to consummate the transaction. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

While it might be argued that the calls from Somosa to Santos prior to the actual sale established a conspiracy between them, this clearly does not extend to Izzi. But whether we treat the November sale as a culmination of conspiracy or simply a substantive crime, there is no evidence linking Izzi to the conspiracy that started at the end of April. Izzi's name was not mentioned at all by the other conspirators at any time and he did not enter the picture until the November sale in East Chicago.

We are aware of the rule that "the question of whether the facts indicate one or more distinct conspiracies is normally a matter of fact to be determined by the jury." *United States* v. *Brown*, 495 F.2d 593, 598 n.5 (1st Cir.), *cert. denied*, 419 U.S. 965 (1974). But it is necessary to prove that a defendant was a knowing participant in the conspiracy. *United States* v. *Brown*, 584 F.2d 252, 262 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 1220 (1979) and cases cited therein. Here, there is no evidence from which the jury could find that Izzi was privy to the activities of the others between the end of April and August 20, much less participated in that scheme.[6] The only explanation for the jury jumping this evidentiary gap was that it transferred the clear guilt of the others to Izzi. Guilt by association is one of the ever present dangers in a conspiracy count that covers an extended period. *See Kotteakos* v. *United States*, 328 U.S. 750, 774-75 (1946); *United States* v. *Bertolotti*, 529 F.2d 149, 155 (2d Cir. 1975). Recently, in upholding a conviction against the claim that there were two conspiracies and not one as charged, we specifically found that there was no danger of transfer of guilt. *United States* v. *DiGregorio*, 605 F.2d 1184, 1192 (1st Cir. 1979). Such a finding is not possible here. The conviction as to Izzi must be reversed.

The next question is whether the variance between the length of the conspiracy as alleged in the indictment and the proof of one of a shorter duration requires a reversal for the other defendants. We hold that it does not.

In *Berger* v. *United States*, 295 U.S. 53, 83 (1935), the Court held that there are three factors to be considered in determining whether the variance is material: whether the allegation and proof substantially correspond; whether the variance could have misled the defendant at trial; and whether the variance is such as to deprive the defendant of his right not to be prosecuted again for the same offense.

[6] We do not think that the use of the same kind of cylinders in November as in May for packaging the heroin supplies the necessary link, as the government urges. Izzi may have been the source for a number of drug pushers, but that does not prove knowing participation in a particular conspiracy.

Applying these factors to this case, we find no material variance. The evidence as to the participation of Santos, Cuevas, and Cruz in the conspiracy up to the middle of August was, as we have already indicated, compelling. The defendants cannot claim that they were misled. Seven of the eight overt acts, all of which were proven, were alleged to have occurred in May and June (six in May and one in June). There is no risk here of any of the defendants being prosecuted again for the same offense.

In *United States* v. *Levine*, 569 F.2d 1175 (1st Cir.), *cert. denied*, 434 U.S. 866 (1977), we pointed out that a variance between the indictment and proof

> only requires reversal if it prejudices the defendant. The source of prejudice in a case such as this is the transference of guilt to an individual defendant involved in one conspiracy from evidence incriminating defendants in a conspiracy in which the particular defendant was not involved.

Id. at 1177.

While we have found a transfer of guilt as to Izzi, it does not follow that evidence of the substantive crime of selling heroin in November by Santos and Izzi was improperly allocated to Cruz and Cuevas. Cruz was expelled from the organization in August. The evidence as to Cuevas established him as a henchman of de Jesus, and not involved at all in the November transaction. There were no statements by Santos, Izzi, or Somosa at the time of the November sale of any other evidence implicating Cruz or Cuevas in any way.

The government may have proved too much as far as Santos was concerned, but, unlike Izzi, he was clearly part of the April to August conspiracy. The fact that Santos sold heroin to Somosa in November does not erase the evidence as to his participation in the earlier conspiracy.

We find no prejudice to Santos, Cruz, and Cuevas in the variance between the indictment and proof of duration of the conspiracy.

II. *The Admission of Statements of Coconspirators*

A review of the record shows that the trial judge did not err in the way he handled the statements of coconspirators. In fact, the judge went further than necessary to insure that the individual defendants would not be prejudiced by coconspirators' statements. Prior to trial, a hearing was held on motions to suppress evidence and, at that time, the district court made searching inquiry as to evidence the government was going to introduce to establish a conspiracy.

Not only did the trial judge inquiry as to what evidence the government intended to introduce, he had a DEA agent take the stand and outline the government's evidence on conspiracy and allowed the agent to be cross-examined. Aware of his responsibility under Federal Rule of Evidence 104(a) and *United States* v. *Petrozziello,* 548 F.2d 20, 23 (1st Cir. 1977), he ruled that the *Petrozziello* standard had been met. The court, however, went further than that. During the trial, it carefully instructed the jury according to the requirements of *United States* v. *Honneus,* 508 F.2d 566, 569-70 (1st Cir. 1974), *cert. denied,* 421 U.S. 948 (1975). While neither the pretrial determination nor the *Honneus* instructions was necessary, *see United States* v. *Martorano,* 557 F.2d 1, 11 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978), this procedure did not prejudice the defendants. As we said in *Petrozziello,* "The added layer of fact-finding may not be needed, Weinstein's Evidence ¶ 104[05], but it can seldom prejudice a defendant." *United States* v. *Petrozziello,* 548 F.2d at 23. Moreover, the court's charge to the jury directed them to view the evidence as the each defendant separately.[7]

[7] We set out the relevant portion of the district court's charge:

A separate crime or offense is charged against each one of the defendants in each one of the indictments. Each offense and the evidence pertaining to it should also be considered separately. The fact that you may find some of the defendants guilty or not guilty on one of the offenses charged should not control your verdict as to any other offense charged against any of the other defendants. It is your duty to give separate personal consideration to the case of each individual defendant. When you do so, you should analyze the evidence in the case, what it shows with respect to that individual leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from evidence as to his own acts and statements, and conduct and on other evidence in the case which may be applicable to him.

We find that the defendants were not prejudiced by the way the district court handled the statements of coconspirators.

III. *The Jencks Act Issue*

This issue arises through the failure of the government to turn over statements of four government witnesses given to a grand jury in the Northern District of Indiana which subsequently indicted Santos and Izzi for selling heroin. The sale, already detailed, was to Somosa in East Chicago, Indiana, on November 8 and 9, 1976. The four witnesses were Somosa, Rios, and DEA Agents Jorge and Jimenez. The grand jury testimony of the witnesses was given prior to the trial on the conspiracy charge in Puerto Rico. However, when the government, pursuant to the Jencks Act, 18 U.S.C. § 3500, furnished the defendants with a number of statements and reports made by witnesses at the start of the trial in Puerto Rico, the grand jury statements of the four witnesses were not included. This omission came to light after the conspiracy trial had ended when Santos and Izzi were brought to trial in the Northern District of Indiana,[8] and the Jencks Act material furnished them there contained the grand jury testimony. Upon examination, it was found to vary in some degree from the witnesses' courtroom testimony in Puerto Rico.

Although the prosecutor in this case and the case in Northern Indiana was the same person, it seems clear that the failure to disclose was negligent rather than deliberate and the defendants do not seriously contend otherwise.

After a full hearing on defendants' motion for a new trial, the district court ruled that the withheld testimony was not exculpatory and, therefore, production was not mandated under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

[8] After trial of one week and some plea bargaining, Santos and Izzi pleaded guilty.

It also found that the inconsistencies "would not have made any difference at all in the outcome of this trial."

The withheld testimony and the way it varies from the courtroom testimony is summarized as follows. Agent Jimenez testified before the grand jury that, on November 8, Somosa handed him a pound of heroin and a pound of cocaine. He testified at trial that he had been given two samples, one of cocaine and the other of heroin. Jimenez testified before the grand jury that Cuevas was at "Frank's Lounge" on November 9. There was no such testimony at the trial. Defendants claim that this could have been used to impeach the credibility of Somosa and Jimenez, both of whom testified as to what happened inside and outside of the lounge of November 8 and 9. At the hearing on the motion for a new trial, the government stated that the grand jury testimony in this respect was a mistake and that, in reality, it was Cuevas' driver, not Cuevas himself, who was in the lounge.

Rios testified before the grand jury that he did not know the last name of Santos, knowing him merely as Franky. At trial, he testified that he had been introduced to Franky Santos as Franky Rubiroso. Rios stated in his grand jury testimony that he did not recall the date on which he flew to New York City in May of 1976. At trial, he testified as to the exact date of the flight. The government pointed out at the post-trial hearing that, prior to testifying at the trial, Rios had been shown the airplane tickets to refresh his memory as to the date. In answer to questions before the grand jury, Rios said that the heroin picked up in New York weighed about seven or eight pounds. On cross-examination during the trial, he gave the weight of the packages as twenty pounds.

It is obvious that the district court was correct in ruling that the grand jury testimony was not exculpatory under the *Brady* rule. What is involved here are minor variations between two sets of inculpatory statements. There is nothing in the grand jury testimony that would "tend to exculpate" or "reduce the penalty" as to any of the defendants. *Brady* v. *Maryland*, 373 U.S. at 88.

The variances could, of course, be the basis for an attempt to impeach the witnesses, which is the reason for the Jencks Act. The question, therefore, is whether the negligent failure to turn over this testimony to defense counsel is grounds for a new trial. We have found no case holding that an inadvertent or negligent failure to furnish Jencks Act material is *per se* grounds for a new trial.

The Supreme Court has held that the harmless error doctrine must be strictly applied in Jencks Act cases. *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976); *Campbell* v. *United States*, 373 U.S. 487, 497 n.14 (1963). Our approach has been to determine whether the defendant has been prejudiced by the government's failure to disclose.

> Principe is wrong, however, insofar as he insists that under 18 U.S.C. § 3500(d) any failure to disclose, no matter how harmless or innocent, requires striking the witness' testimony or a mistrial. . . . The district court was entitled to conclude that the government's conduct fell short of being so flagrant as to warrant a mistrial regardless of prejudice, and, further that Principe was not materially prejudiced by the belated disclosure.

United States v. *Principe*, 499 F.2d 1135, 1139 (1st Cir. 1974). *See also United States* v. *McGovern*, 499 F.2d 1140, 1143 (1st Cir. 1974) (since late delivery of Jencks Act material did not prejudice defense and was not of such magnitude as to suggest bad faith by the government, there was no ground for reversal); *United States* v. *Sharpe*, 452 F.2d 1117, 1119-20 (1st Cir. 1971) (defendant failed to show prejudice as a result of government's inadvertent failure to turn over two of five pages of Jencks Act material). In a case involving an inadvertent or negligent failure to turn over tapes, the Second Circuit said, "The question, then, is whether the defense was so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the government." It held that it was not so prejudiced. *United States* v. *Miranda*, 526 F.2d 1319, 1328-29 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976).

Our examination of the trial transcript convinces us that the light caliber of the impeachment ammunition furnished by the grand jury testimony would not have dented the well buttressed evidence of the government. The failure of the government to furnish the grand jury testimony did not result in any prejudice to the defendants.

The conviction as to defendant Izzi is reversed. The convictions of the other defendants are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The First Circuit

77-1383

UNITED STATES,
Appellee,

v.

FRANK SANTOS,
a/k/a FRANKIE RUBIROSO,
a/k/a EFRAIN SANTOS,
Defendant, Appellant.

ORDER OF COURT

Upon consideration of "appellant Santos' Petition For Rehearing and Suggestion for Rehearing In Banc."

It is ordered that said petition be and the same hereby is denied.

By the Court:
DANA H. GALLUP, Clerk

By /s/ Francis P. Scigliano
Chief Deputy Clerk

Dated: March 27, 1980.